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JURISPRUDENCE AND THE UNIFORM COMMERCIAL CODE: A "COMMOTE"

by
Peter Winship*

I. PROLOGUE

At a recent panel discussion of Gilmore's *The Death of Contract*, Professor Richard Danzig remarked on how the accepted forms of publication limit legal scholarship.¹ Gilmore's book and the academic response to the book are good illustrations of this point. *The Death of Contract* is a compilation of lectures delivered by Professor Gilmore at the law school of Ohio State University. It retains in print the charm and informality of the oral lecture; even the footnotes, added apparently as a concession to the academic community, are interpolations of the text rather than lapidary citations of authority.² But what is truly remarkable about the book is the academic response it has generated. Virtually every leading scholar of contracts law in the United States today has written an extended comment on the book. Yet these commentaries are called *Book Reviews* and consequently are buried in the back of law journals and the *Index to Legal Periodicals*. The commentaries are not *Articles* because law journal *Articles* are traditionally "original" works with a full array of academic support in the footnotes; they are not *Comments* or *Notes* because only students write these lower forms of academic literature.³

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1. The remarks were made by Professor Danzig at the annual meeting of the Commercial, Contract & Related Consumer Law Section of the Association of American Law Schools, Dec. 27, 1976, in Houston, Texas.

2. The published lecture is an accepted form in academic legal literature. See, e.g., the publications of the Oliver Wendell Holmes lectures at Harvard, the Thomas M. Cooley lectures at Michigan, and the Storrs Lectures on Jurisprudence at Yale. Few lectures survive in print as well as those of Professor Gilmore. See also G. GILMORE, *THE AGES OF AMERICAN LAW* (1977). Few published lectures have received the attention that *THE DEATH OF CONTRACT* has. At last count more than fourteen reviews of the book have been published in American law journals with the total number of printed pages now more than double the pages in *THE DEATH OF CONTRACT*.

3. Professor Danzig also mentioned the publication of monographs as articles, which in effect inhibits circulation of the monograph. He cited in particular Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974). But see D. KING, *THE NEW CONCEPTUALISM OF THE UNIFORM COMMERCIAL CODE* (1968) which reprints major portions of two articles published in the *St. Louis University Law Journal*. Note, however, that the publisher of King's monograph is the St. Louis University School of Law.

Danzig's point can easily be exaggerated. Some law journals are more receptive than others. I am reminded of the difficulty Professor Richard Abel had in publishing his brilliant review of M. RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* (1972); several leading journals apparently rejected the review because it was too long to be published as a Book Review. The review was finally published as a titled review essay: Abel, *Law Books and Books about Law*, 26 STAN. L. REV. 175 (1973). See also Quinn & Lidji, Book Review, 5 HUMAN RIGHTS 119 (1976) (33 pages). Other journals are less disturbed by formal categories. The *Wisconsin Law Review*, for example, has a separate category for "Commentary." See, e.g., Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law,"* 1977 WIS. L. REV. 81.

As this "commote" was going to press I received a special issue of the *Michigan Law Review* commemorating that Review's 75th year. The editors state:

As I listened to Professor Danzig at the panel discussion I remembered my own reaction to an article written by Danzig on the jurisprudence of the Uniform Commercial Code.⁴ I had made extensive marginal notes on a copy of the article, had commented on the article to my commercial law class, and had even considered writing the author to quibble about several points. Danzig's remarks at the panel discussion encouraged me to ask the editors of the *Southwestern Law Journal* if they would be interested in publishing my "commotes"⁵ on Danzig's article. With their blessing, therefore, what follows is not a formal *Article* written as a *Reply* to Danzig,⁶ but a relatively informal elaboration of thoughts provoked by Danzig's article.⁷

II. DANZIG'S THESIS

Professor Danzig's main thesis is that critical provisions of article II of the Uniform Commercial Code abdicate legislative responsibility by leaving to courts the discovery of legal rules in the context out of which a legal dispute arises.⁸ He recognizes that commercial law may be atypical in that it deals with a subcommunity of professionals. He also notes that the Code was drafted subject to political pressure for widespread uniform adoption.

We told our authors from the start that they would be freed from the traditional standards of size, style, and format that occasionally turn law reviews into compendiums of encyclopedic articles. Essays of moderate length were welcome, but many are much shorter than the usual law review fare. Several are fully documented and heavily footnoted, but this was not required or even encouraged. We sought in this issue to give our contributors an opportunity to contemplate, comment, speculate, or even criticize in a forum not usually congenial to such pursuits.

Editor's Preface, 75 MICH. L. REV. Nos. 5 & 6, i-ii (1977).

Nor is Danzig the first to call attention to publishing conventions which limit the usefulness of academic scholarship. Karl Llewellyn noted, for example, the illogical convention of neglecting course-books as a source of legal scholarship. See Llewellyn, *On the Problem of Teaching "Private" Law*, 54 HARV. L. REV. 775, 781-82 (1941).

Students of comparative law, of course, have long been aware of the different forms academic literature takes in different countries. Law teachers from Commonwealth countries, for example, frequently have impressive bibliographic résumés but individual pieces are usually much shorter than those of their United States' colleagues. A comparative study of law publishing would offer rich insight into differences in legal culture.

4. Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975). Note that Danzig designates his article as "A Comment" and refers to it as an "Essay." *Id.* at 622.

5. "Commote" is a portmanteau word (comment-note), with overtones of "emote" and "stir up a commote." Even the editors of this *Journal*, although approving the publication of this "commote," had some initial difficulty determining under whose editorial jurisdiction it would fall.

6. After writing the text I was interested to discover that Professor Danzig has on occasion resorted to the formal Reply. See Danzig & Lowy, *Everyday Disputes and Mediation in the United States: A Reply to Professor Felstiner*, 9 LAW & SOC'Y REV. 675 (1975). The Reply is an accepted form of legal literature and there are a number of examples of lively exchanges, not the least of which is Llewellyn's response to an article by Pound. Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). The convention is that the Reply is published in the same journal as the original article.

7. The only other extended comment I have found on Danzig's article is a note by Professor Gilmore in his latest book. See G. GILMORE, *supra* note 2, at 140-41 n.38. See also Casebeer, *Escape from Liberalism: Fact and Value in Karl Llewellyn*, 1977 DUKE L.J. 671, 677 n.24.

8. I have found it difficult to summarize accurately Professor Danzig's article and I urge the interested reader to read the original. It should be noted that Danzig felt he may have oversimplified the contrast between Llewellyn and the Hart-Sacks' jurisprudential approach. Danzig, *supra* note 4, at 624 n.10.

Nevertheless, Danzig argues that Karl Llewellyn's jurisprudential preferences reinforced these situational factors.

Danzig contrasts Llewellyn's jurisprudential ideas ("preferences," "choices") with those of the late Professor Henry M. Hart, Jr. and Dean Albert M. Sacks as expressed in their great underground classic on legal process.⁹ Hart and Sacks, as summarized by Danzig,¹⁰ consider the legislature a law-making body whose goal is to maximize social utilities. The legislature is democratically elected and politically responsive. It is guided by ethics and economics. It views law as a vehicle for growth, and lawyers as specialists in enlarging the pies of social living. In contrast, Llewellyn views the legislature as setting out guidelines for courts to find the law which is "immanent" in a specific fact pattern. The critical legal institution, therefore, is not the legislature but the courts, which have low visibility and little responsibility to the general public. The courts rely on the methods of sociology and anthropology. The lawyer occupies a more passive role in relations with the client because it is the client who knows the fact patterns from which the court will determine the legal rule for resolving the dispute.

Danzig suggests that article II's aim and achievement might be viewed as dictating a *method* by which courts may arrive at a result rather than dictating a particular *result*. But Danzig ultimately concludes Llewellyn just does not like statutes.

Initially my intuition was that Article II of the UCC might profitably be analyzed as an attempt to coerce courts into deciding cases in the Grand Style by means of the devices described in the text. As I examined the 'policies' endorsed by Article II, however, I came to the conclusion that at least in this instance Llewellyn was rather like Fuller's Judge Foster. His 'penchant for creating holes in statutes reminds one of the story . . . about the man who ate a pair of shoes. Asked how he liked them, he replied that the part he liked best was the holes. That is the way he feels about statutes; the more holes they have in them the better he likes them. In short, he doesn't like statutes.'¹¹

It is Llewellyn's "denigration" of legislation which, Danzig suggests, determined much of the Code's form and content.

Danzig also places particular emphasis on the Code's alleged indifference to moral imperatives.¹² Law-making, he suggests, requires going beyond a narrow focus on what "is" to a consideration of what "ought to be." The Code does refer to "good faith,"¹³ "unconscionable,"¹⁴ and "decent dealers."¹⁵ But the Code, Danzig argues, assumes that these value-terms have an

9. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958).

10. The summary of Hart & Sacks set out in the text is taken from Danzig's article. Danzig, *supra* note 4, at 624-25.

11. Danzig, *supra* note 4, at 632 n.39. The quotation from Professor Lon L. Fuller is from Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 634 (1949). The footnotes in Danzig's article round out his text and should be read with care.

12. Fuller, *supra* note 11, at 627-31. Danzig notes that a similar charge of amorality was made against the American realists and he suggests that the jurisprudential connection between the critiques of the Code and legal realism has been neglected.

13. See, e.g., U.C.C. §§ 1-201(19), -203, 2-103(1)(b). All references are to the 1972 OFFICIAL TEXT WITH COMMENTS unless otherwise noted.

14. *Id.* § 2-302.

15. *Id.* § 1-205, Comment 5.

objective existence which can be discovered by careful examination of the factual situation. Several reasons are then given as to why this approach is disturbing: it reaffirms predominant morals; it encourages judges to project their own values; critical choices are left to institutions which are not responsible to the public; it undermines certainty and consistency; and it focuses on the parties at hand rather than on community-wide concerns. Finally, Danzig rejects the suggestion that commercial law compels leaving questions of utility to private parties.

Danzig concludes his essay with a brief summary of his thesis:

It is suggested here that the animating theory of Article II is that law is immanent. The law job is to search it out. There is thus no need for a legislature to create law. The central focus, as in all the writings of the realists, is on courts. Article II is a document whose thrust is not so much to put law on the statute books as it is to coerce courts into looking for law in life.¹⁶

III. COMMOTES

A. *Llex Llewellyn*

A basic assumption of Professor Danzig's article is that the Uniform Commercial Code, especially article II, can be taken as a true measure of Karl Llewellyn's jurisprudential perspective. Indeed, Danzig suggests that the Code may teach us more about the jurisprudence of American Realism than Llewellyn's "lifetime of lectures on law-in-theory."¹⁷ In a footnote Danzig qualifies this assumption by noting Permanent Editorial Board amendments and legislative revision,¹⁸ but he makes no attempt to evaluate the extent of these modifications on Llewellyn's original input, and he ultimately concludes that "if ever a statute can be taken as suggestive of a legal philosophy this seems to be such a case."¹⁹

Much has been written about the extent of Karl Llewellyn's influence on the Uniform Commercial Code by virtue of his position as Chief Reporter of

16. Danzig, *supra* note 4, at 635.

17. *Id.* at 621-22.

18. *Id.* at 621 n.3. This footnote reads:

The Uniform Commercial Code reflects, of course, much more than the thought of Karl Llewellyn. For an analysis strongly downplaying his influence in the original drafting, see Mentschikoff, *The Uniform Commercial Code, an Experiment in Democracy in Drafting*, 36 A.B.A.J. 419 (1950). The original drafts were themselves modified as a result of both legislative revisions, . . . and amendments suggested by the Code's 'Permanent Editorial Board.' But if ever a statute can be taken as suggestive of a legal philosophy this seems to be such a case. Article II was Llewellyn's area of interest. His wife and disciple was its second most influential author. Both retained substantial influence over the document through the period of the 1962 official text which is quoted in this Essay.

19. *Id.* Compare Danzig's conclusion with the more tentative conclusion of Professor David Carroll:

The most difficult aspect of defining the relationship between Llewellyn and the Code . . . stems from the fact that it is impossible to assess accurately the degree to which Llewellyn lost control of the Code or the extent to which his purposes were frustrated. . . . In the final analysis, however, it is probably only relevant to attempt to determine whether, from Llewellyn's standpoint, the U.C.C. has or ever will have an overall beneficial effect on the societal balance of the legal system.

Carroll, *Harpooning Whales, of which Karl Llewellyn is the Hero of the Piece; or Searching for More Expansion Joints in Karl's Crumbling Cathedral*, 12 B.C. INDUS. & COM. L. REV. 139, 151-53 (1970). See also Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 488 n.11 (1967).

the Code for the critical first ten years of its drafting.²⁰ In tribute to the dominant role of the Chief Reporter the Code has been referred to as "Llewellyn's Code," "Code Llewellyn," "Lex Llewellyn" and even "Karl's Kode."²¹ Many of these assessments, however, must be treated cautiously as the hyperbole of memorial essays²² or as a part of Code campaign politics.²³

In his intellectual biography of Llewellyn and the American Realists, Professor William Twining concludes his historical outline of the Code's development with a summary of points for which he finds "widespread agreement":

(ii) Almost all of the initial planning in respect of scope, objectives, method and style was Llewellyn's and even the later editions of the Code are remarkably close to his original conception.

(v) The Code was the product of teamwork. Llewellyn only exceptionally used his key position to push through pet ideas of his own in the face of opposition; rather he regularly exhibited a rare openness to suggestion. . . .

20. Typical of comments about Llewellyn's influence are Corbin, *The Uniform Commercial Code—Sales; Should it be Enacted?*, 59 YALE L.J. 821, 821-22 (1950) ("Without question, the leading spirit in the whole undertaking was the reporter, K.N. Llewellyn; but every other member took an active and critical part in discussion and construction of all provisions."); Friedman & Macaulay, *Contract Law and Contract Teaching: Past, Present, and Future*, 1967 WIS. L. REV. 805, 808 ("Probably the most important product of post-realist effort is the Uniform Commercial Code; Karl Llewellyn was a vital force in its creation."); Kripke, *The Principles Underlying the Drafting of the Uniform Commercial Code*, 1962 U. ILL. L.F. 321, 321 ("I made it clear that I had no intention of writing in the field of jurisprudence. . . . Persons interested in this topic would do better to consult the jurisprudential writings of the late Prof. Karl N. Llewellyn, the guiding spirit of the Code.").

For a wry comment on Llewellyn's drafting experience see Beutel, *The Proposed Uniform Commercial Code as a Problem in Codification*, 16 LAW & CONTEMP. PROB. 141, 143 n.5 (1951):

Professor Llewellyn during his service on the Commission on Uniform Laws drafted some amendments to the N.I.L. which were never approved; he is also the draftsman of the Trust Receipts and parts of many other uniform acts most of which are narrow statutes. His most famed writings are in the field of Jurisprudence; but he has published a case book in Sales.

For brief histories of the evolution of the Code see R. BRAUCHER & R. RIEGERT, INTRODUCTION TO COMMERCIAL TRANSACTIONS 19-31 (1977); 1953 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 139-50; W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 270-301 (1973) (especially pp. 281-83).

21. W. TWINING, *supra* note 20, at 271. The sources Twining cites for these epithets include F. WALLACH, INTRODUCTION TO EUROPEAN COMMERCIAL LAW 42 (1953); Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 330 (1951); Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1962); Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213 (1966).

For some reason authors of commercial law articles have a penchant for contrived titles. See, e.g., the titles of the articles by Professors Carroll and Leff cited *supra* note 19. Unfortunately few of these authors can sustain this wit beyond the title. For epigrams per page, however, Professor Leff can certainly hold his own.

22. See, e.g., Gilmore, *supra* note 21.

23. See Professor Leff's collection of citations of "political" writings in Leff, *supra* note 19, at 488 n.11. A particularly clear example is Mentschikoff, *The Uniform Commercial Code: An Experiment in Democracy in Drafting*, 36 A.B.A.J. 419 (1950). See Danzig's reference to this article, *supra* note 18. Dean Mentschikoff later concluded, however, that "[d]espite the numbers of persons involved in the drafting of the Code, the extent to which it reflects Llewellyn's philosophy of law and his sense of commercial wisdom and need is startling." Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MOD. L. REV. 167, 168 n.3 (1964). This latter article is reprinted substantially unchanged in S. MENTSCHIKOFF, COMMERCIAL TRANSACTIONS: CASES AND MATERIALS 3-12 (1970). It has been described as "obligatory" reading for students. Donnelly, *Materials on Commercial Transactions: Back to the Curriculum Committee*, 25 J. LEGAL EDUC. 94, 95-96 n.3 (1973).

(vi) Although concessions were made to placate opponents, there were few, if any, matters on which Llewellyn made sacrifices of principle or substance to save the Code. . . .

(vii) Llewellyn's principal contributions were made in the period 1937 to 1953, and most importantly in the first phases of planning and drafting between 1940 and 1949.²⁴

Twining qualifies this conclusion by noting that he does not attempt to dig far below the surface of recorded events²⁵ and that to assess how much of Llewellyn's approach survived would require "a more precise set of categories than we have at present for differentiating between different styles and techniques of drafting."²⁶

Llewellyn himself on several occasions expressed dismay at the number of amendments made to provisions he proposed or supported. "I am ashamed of it [the Code] in some ways; there are so many pieces that I could make a little better; there are so many beautiful ideas that I tried to get in that would have been good for the law, but I was voted down."²⁷ On a later occasion he wrote:

There are upwards of a hundred material places on which as Chief Reporter I was outvoted on a position I believed in and was fighting for. I doubt if time and thought have brought me round on as many as one sixth of such points; a good twenty and more still cause grief which is acute.²⁸

In the same article, however, Llewellyn goes on to emphasize that doubts about details should be considered keeping in mind that they were subject to "repeated majority votes of different but highly intelligent bodies of lawyers, after informed and sustained meditation and discussion."²⁹ As for the amendments Llewellyn regretted, he gives no details in these later works except for his suggestion that there were "twenty or more" that he considered significant.

An obvious qualification on the pervasive influence of Llewellyn is that while he was Chief Reporter for the entire Code he was responsible in the first instance only for the drafting of the Sales provisions in article II and the General Provisions in article I. Although these two articles reflect Llewellyn's open-ended drafting style in many of their provisions,³⁰ the legislative

24. W. TWINING, *supra* note 20, at 300-01.

25. *Id.* at 300.

26. *Id.* at 296 (with particular reference to post-1952 amendments).

27. Llewellyn, *Why a Commercial Code?*, 22 TENN. L. REV. 779, 784 (1953). Llewellyn goes on to state, however, that "when you compare [the Code] with anything there is, it is an infinite improvement." *Id.*

28. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367, 374 n.2 (1957).

29. *Id.* This statement reflects Llewellyn's belief in the democratic process of drafting emphasized by Mentschikoff, *supra* note 23, and by W. TWINING, *supra* note 20, at 301. On the other hand, the procedure was not only dictated by the procedures of the organizations sponsoring the Code but also by the political necessity of forestalling potential opposition groups.

30. Dean Mentschikoff describes the drafting concepts as follows:

The most important drafting concept rests on the belief that relative certainty and uniformity of construction depend on the court's perception of the situation represented by the rule and the reason the rule was adopted, and that proper construction follows the reason and is limited or extended by it. The attempt, therefore, has been to draft rules so that both the situation being covered and its

form in other articles is far less open-ended. Dean Mentschikoff notes that "the conveyancing approach to drafting by all-inclusive detailed statement" influenced amendments to the Code, and she mentions in particular the amendments to article IV which she attributes to the influence of New York banking counsel.³¹ Professor Gilmore notes the same "conveyancing approach" taken by practitioners when revising the Code but he finds the clearest example of this influence in article IX on Secured Transactions.³² To the extent, therefore, that the title to Danzig's article suggests that he will deal with the jurisprudence of the Code as a whole, it is misleading.³³

Reading Danzig's comments as limited to the final text³⁴ of article II, I would agree with him that article II was shaped in large part by Llewellyn. Anyone who has acted as a draftsman knows the tremendous power the draftsman has to control the issues to be resolved as well as the actual resolution of the issues. I do suggest, however, that Llewellyn's impact on the final text should be reevaluated after a detailed and comprehensive study of the evolution of the Code provisions, especially those which appear in the early drafts.

The clearest indication that a reappraisal of Llewellyn's impact on the Code is in order is a recent comment by Professor Gilmore which emphasizes the significant amendments made to the original. In a frequently-cited passage written in 1962, soon after Llewellyn's death, Gilmore stated:

Make no mistake: this Code was Llewellyn's Code; there is not a section, there is hardly a line, which does not bear his stamp and impress; from beginning to end he inspired, directed and controlled it. . . . He cheerfully gave ground when he had to: the final product was indubitably his and will remain an enduring tribute to his memory.³⁵

In lectures delivered in 1976, however, Professor Gilmore places the Code in the broader context of American legal history. In the course of his comments he remarked:

On the whole and in the long run the conservatives or traditionalists had their way. Llewellyn's proposals for a radical restructuring of the law—as, for example, in distinguishing between the standards applicable to

reason tend to appear on the face of the language, and to keep the language reasonably open-ended.

Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MOD. L. REV. 167, 170 (1964).

Llewellyn's approach was shared by many of the draftsmen immediately associated with the initial drafting of the Code provisions. See, for example, the defense of Llewellyn's open-ended approach by Professor Gilmore, then Assistant Reporter for Article IX. Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341 (1948).

31. Mentschikoff, *supra* note 30, at 171 n.9.

32. Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461, 472-73 (1967). Gilmore has on occasion, however, stressed the open-endedness of even article IX. Gilmore, *Article 9: What it Does Not Do for the Future*, 26 LA. L. REV. 300, 300-10 (1966).

33. The text of Danzig's article refers only to article II and the title may have been suggested by editors to catch the eye of potential readers who might be put off by an indication that it deals only with an even narrower topic. Note that the obvious point that article II is different in style from other Code articles is also made in G. GILMORE, *supra* note 2, at 140-41 n.38.

34. "Final text" here refers to the 1957 official text after it had passed through the crucible of review by the New York Law Revision Commission. Because of ill-health Llewellyn was much less active in the Code campaign after 1955.

35. Gilmore, *supra* note 21, at 814-15. Professor Gilmore's full statement, especially his remarks about Llewellyn's drafting style, should be read.

'merchants' and those applicable to nonmerchants—survived the early drafts only in an attenuated, watered down, almost meaningless form. Provisions which would have notably increased the liability of manufacturers for their defective goods were simply deleted from the later drafts. Not only the substance but the style of the Code changed dramatically as the drafting process continued. . . . Llewellyn's code, as he conceived it, would have abolished the past without attempting to control the future. That jurisprudential approach did not satisfy the groups of practicing lawyers who participated in the project and whose influence increased as the drafting approached the final stages. . . . At all events they insisted on a tightly drawn statute, designed to control the courts and compel decision. To a considerable degree, they got what they wanted.³⁶

The next section develops several of Gilmore's recent comments through an analysis of the "merchant" provisions in the early drafts. If Danzig's thesis that the Code is a true measure of Llewellyn's jurisprudential perspective is to be taken seriously, the following examination of early drafts should both indicate more clearly the provisions in the final draft for which Llewellyn was primarily responsible and add further examples of Llewellyn's jurisprudential choices.

B. A "Merchant's" Code

The Uniform Commercial Code went through numerous drafts before its sponsors published the Final Text edition in November 1951.³⁷ The texts of these early drafts reveal numerous modifications to the sales provisions which now comprise article II.³⁸ As suggested above, among the most interesting of these modifications is the gradual attrition of Llewellyn's initial emphasis on the need to develop special rules and procedures for professional businessmen.

36. G. GILMORE, *supra* note 2, at 85. These gloomy remarks go further regarding changes in substance than any other piece I have read by Gilmore. Indeed, the final text version of the lecture goes further than the delivered lecture. See Gilmore, *The Age of Anxiety*, 84 YALE L.J. 1028, 1038 (1975). Gilmore had, however, remarked earlier on the changes in style from Llewellyn's open-ended approach. See, e.g., Gilmore, Book Review, 73 YALE L.J. 1303, 1308 (1964).

37. A list of the generally-circulated draft texts of the Code is set out in M. EZER, *UNIFORM COMMERCIAL CODE BIBLIOGRAPHY* 1-6 (1972). Secondary sources indicate that there are a number of unpublished intermediate drafts in the collections of some libraries. Professor Leff refers to a number of such drafts. Leff, *supra* note 19, at 485 n.1, 489 n.12, and 494 n.34. Some of Llewellyn's personal notes on article II are also apparently available. See Spies, *Uniform Commercial Code: Article 2—Sales, Performance and Remedies*, 44 TEXAS L. REV. 629, 637 n.30 (1966).

Discussion of earlier drafts and comments in the text which follows explores Llewellyn's jurisprudential approach and is not designed to suggest what the official text of the Code "really means." For a criticism of Leff's use of legislative history as "not only risky but a little silly," see R. DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 176-77 (1975). See also the following comment:

It will have to be left to the Supreme Court of the United States to rule out the use of prior versions of sections and comments as an unconstitutional form of cruel and inhuman punishment of fellow lawyers. Or perhaps the decisive argument will be that because of their scarcity (only a few libraries have them) their use denies equal protection of the laws.

R. SPEIDEL, R. SUMMERS & J. WHITE, *TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW* 44 (2d ed. 1974). The 1952 text included § 1-102(3)(g) which stated: "Prior drafts of text and comments may not be used to ascertain legislative intent." The 1957 official text omitted this provision.

38. Professor Gilmore suggests that the influence of professionals outside the immediate group charged with drafting the sales provisions was much less than was the case for other parts of the Code. Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461, 473 (1967).

Pre-Code commercial law purported to regulate *all* transactions, whether carried out by a professional or a non-professional. The 1906 Uniform Sales Act established rules of general application with only a few exceptions. There was a specific reference to "a seller who deals in goods of that description" in the rule governing the implied warranty of quality;³⁹ trade usages or custom could negative or vary obligations otherwise arising by operation of law.⁴⁰ There was also the ubiquitous reference to the supplementary principles of the "law merchant," whatever that meant.⁴¹

The first major revision of the Uniform Sales Act which is now generally available is the 1941 "second draft" of a Revised Uniform Sales Act.⁴² As chairman of the special committee of the National Conference of Commissioners on Uniform State Laws to consider the revision of the 1906 Act,⁴³ Karl Llewellyn prepared the general Report and the Comments on individual sections of the 1941 text. Although the Report stresses that the revised text continues the concern of the 1906 Act for peculiarly mercantile situations, the new draft goes well beyond the original Act in its recognition of the distinct rules for professionals.⁴⁴ The text of the draft Revised Act is the forerunner of article II of the Uniform Commercial Code but only a few of the 1941 innovations survive in the final text of the Code.⁴⁵ The 1941 text and commentary, however, are worth exploring in some detail because they represent Llewellyn's clearest statement before the direct influence of other advisers became important.

39. UNIFORM SALES ACT § 15(2). Compare U.C.C. § 2-314.

40. UNIFORM SALES ACT § 71: "Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale." Compare U.C.C. § 1-205. See also *id.* §§ 1-201(11), 2-202, -314(3), -316(3)(c).

41. UNIFORM SALES ACT § 73. Compare U.C.C. § 1-103. For a brief discussion of "law merchant" see Scrutton, *General Survey of the History of the Law Merchant*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 7 (1909). See also Burdick, *What is the Law Merchant?*, 2 COLUM. L. REV. 470 (1902); Ewart, *What is the Law Merchant?*, 3 COLUM. L. REV. 135 (1903). Reference to the "law merchant" appears in a number of uniform commercial laws. See, e.g., UNIFORM PARTNERSHIP ACT § 5.

42. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS [NCCUSL], REPORT AND SECOND DRAFT: THE REVISED UNIFORM SALES ACT (1941) [hereinafter cited as 1941 DRAFT]. There were earlier proposals to introduce a federal sales act applicable to interstate and foreign commerce and built on the provisions of the Uniform Sales Act. Professor Williston, draftsman of the 1906 Act, collaborated in 1922 with a committee of the American Bar Association in the preparation of a draft federal act. Similar draft bills were introduced in Congress in 1937 and 1939. These draft bills provided an impetus to the proposed revision of the 1906 Act by the National Conference of Commissioners on Uniform State Laws. W. TWINING, *supra* note 20, at 277-78. See also Thomas, *The Federal Sales Bill as Viewed by the Merchant and the Practitioner*, 26 VA. L. REV. 537, 542-45 (1940).

43. Llewellyn was a Commissioner on Uniform State Laws, representing New York, from 1926 to 1951. He was appointed chairman of the Commercial Acts section of the NCCUSL in 1937. After the agreement between the NCCUSL and the American Law Institute in 1944 Llewellyn became Chief Reporter for the Uniform Commercial Code. W. TWINING, *supra* note 20, at 104, 278 & 281-85.

44. 1941 DRAFT, *supra* note 42, at 18-19. See also *id.* at 20-21. The Report acknowledges that the 1941 text goes beyond the original 1906 Act. "The lines of relation of this Second Draft to the Original Act of 1906, are . . . those of preservation and development of the essential frame, and of supplement—supplement largely either by developing implications or by providing implementation." *Id.* at 18.

45. For general discussion of the "merchant" provisions in the final text of the Code see Dolan, *The Merchant Class of Article 2: Farmers, Doctors, and Others*, 1977 WASH. U.L.Q. 1; Newell, *The Merchant of Article 2*, 7 VAL. L. REV. 307 (1973). The specific "merchant" provisions in the 1906 Act survive in one form or another in the final text of the Code. See U.C.C. §§ 1-103, -205, 2-314.

Among the 1941 provisions which survive are the definitions of "merchant" and "between merchants."⁴⁶ The definition of "between merchants" appears first⁴⁷ and the accompanying Comment sets out the following principles underlying the Act's scope:

The reasons for making this category appear in the Report, and appear again and again in the particular sections of the Draft which are expressly extended only to professional dealings between professionals.

Such persons, in regard to such dealings, have an understanding of trade practice, habits and skills of adjustment, needs for speedy action, probable commitments, access to counsel, which make many provisions both needful and feasible for them which are neither needful nor feasible for, say, farmers or household consumers.

Mansfield's incorporation of the law merchant into the common law was in all fields but that of Sales the incorporation of a body of law tailored directly and skillfully to the needs of merchants in their dealings with other merchants—to which body of law other men had to conform, or (as in the case of lawyers' partnerships) appropriate exceptions could be made.

In Sales this did not occur; and such specially adapted law as merchants have received has been worked out so to speak under cover, by way of 'general' rules of supposedly 'general' application, which just happen to apply to situations in which the participation of a non-merchant approaches the unthinkable. Examples are the 'to arrive' contract, or C.I.F. But experience shows that precisely these purely mercantile rules have given the most clarity and the most satisfaction, within the whole Sales field.

The Draft proposes to free the matter from confusion by bringing such situations out into daylight, tailoring rules to special mercantile need where there is such need, but not inflicting such rules on non-professionals, when non-professionals might be at a disadvantage under them.⁴⁸

The Comment on the definition of "merchant" also stresses that the concept includes "all such professionals in the market, and only such."⁴⁹

46. U.C.C. § 2-104.

47. Llewellyn's primary interest apparently was to separate out transactions in which only professionals are involved. Only secondarily was he concerned about the general obligations imposed on a professional by virtue of being a professional.

48. 1941 DRAFT, *supra* note 42, § 1. The comment goes on to refer to § 1-B, discussed at note 69 *infra* and accompanying text, and to distinguish the proposed revised text from continental Commercial Codes:

There is here no borrowing of the Continental troubles and confusions as to when a transaction is 'commercial' and when it is 'civil'. That confusion rests first of all on 'commercial' transactions being worked out as transactions *by* a merchant. The Draft deals with transactions *between* merchants, which are unambiguous, under the definition. Secondly, the Continental trouble rests on the setting up of two rigidly severed set of rules. The Draft allows adjustment by use of the 'between merchants' rule wherever it is apt to the case.

Id. at 38. For a fuller explanation of the continental distinction between "civil" and "commercial" law, see Schlesinger, *The Uniform Commercial Code in the Light of Comparative Law*, 1 INTER-AM. L. REV. 11, 36-42 (1959). Not all commentators on the Code agreed with Llewellyn that the U.C.C. is unlike continental Commercial Codes. See the remark by the late Professor Carl Fulda to the New York Law Revision Commission: "a distinct departure from traditional notions and a move in the direction of European legal systems whose Commercial Codes establish separate legal rules for merchants." 3 REPORT OF THE NEW YORK LAW REVISION COMMISSION FOR 1955, at 2165 (1956). See also Keyes, *Toward a Single Law Governing the International Sale of Goods—A Comparative Study*, 42 CALIF. L. REV. 653, 658 & 660 n.23 (1954).

49. 1941 DRAFT, *supra* note 42, at 43.

In addition to these two basic definitions, the 1941 text introduces several significant mercantile innovations which do not survive in the final text of the Code. The most interesting of these is the attempt to institutionalize the finding of mercantile facts through merchant experts. Sections 59 to 59-D of the 1941 draft⁵⁰ provide a procedure "to accomplish speedy and competent determination of questions of fact which fall within the field of special merchants' knowledge rather than of general knowledge."⁵¹ By these provisions, either party in a sales dispute between merchants is empowered to submit specially the following questions of mercantile fact to "a special sworn expert tribunal":⁵²

- (a) The effect on the terms or conditions of the sale or contract to sell, of mercantile usage, or of the usage of a particular trade;
- (b) The conformity or non-conformity in quality, routing, or any other mercantile aspect of any delivery, to the duties or conditions resting on the seller, and the measure of the discrepancy, if any; and whether any defect in performance has been substantial;
- (c) The mercantile reasonableness of any action by either party, the mercantile reasonableness of which is challenged;
- (d) Any other issue which requires for its competent determination special merchants' knowledge rather than general knowledge.⁵³

The procedures for demand, selection, hearings, and determination are set out. Although the parties initiate the submissions to the merchant experts, the trial court retains control of the proceedings. The court settles the issues of mercantile fact to be submitted,⁵⁴ selects the experts if the parties fail to do so,⁵⁵ and presides at the hearing.⁵⁶ Although a unanimous finding by the experts may be received in evidence in the particular dispute,⁵⁷ a Comment notes that the procedure is not designed to build precedent since "[t]he *fixing* of trade practice and standards is believed to be properly a task for associations."⁵⁸

This machinery for the determination of mercantile fact is the foundation on which other important 1941 draft provisions rest. The Report notes the difficulty courts have in spelling out the relation of trade usage to particular language.⁵⁹ It suggests that a prime reason for the confusion is the jumble of both reasonable and dubious "usages" which appear in court opinions and which result from the lack of machinery to determine usages. "But *if* usage can be determined with some reasonable reliability, then the policy of the Original Act, of giving to usage as full a scope as reason will permit, is the only sound policy."⁶⁰ The draft text, therefore, spells out in detail the place

50. *Id.* at 254-57, 288.

51. *Id.* § 59(2).

52. *Id.* § 59-C(1). The introductory Comment to these sections rejects the idea of a general "commercial court" on the ground that it could not keep abreast of commercial usages in a hundred different trades. *Id.* at 252-53.

53. *Id.* § 59(1).

54. *Id.* § 59-A(4).

55. *Id.* § 59-B(4). The court is directed, however, "to take into account the existence of any trade association or arbitration association having special panels, which may be available." *Id.*

56. *Id.* § 59-C(2).

57. *Id.* § 59-D. The experts' findings must be unanimous or the court will appoint a new panel. *Id.* § 59-C(3).

58. *Id.* at 256.

59. *Id.* at 55.

60. *Id.* (emphasis in original).

of trade usage.⁶¹

Merchant experts are also essential for the concept of "mercantile performance" introduced by the 1941 draft.⁶² Pre-Code law did not grant the seller the privilege of making a non-complying delivery and forcing the buyer to accept an adjustment where the defect was not substantial. The buyer, on the other hand, was granted the analogous privilege of accepting a defective delivery but still recovering damages for the defect.⁶³ The 1941 text changes this rule by barring the merchant buyer's right to reject where the merchant seller shows there has been "mercantile performance" as contrasted with exact performance.⁶⁴ The policy behind mercantile performance is set out in the text itself.⁶⁵

The principle of mercantile performance is that a contract between merchants calls for a performance having the expected substance, but that discrepancies are not to interfere with the flow of goods in commerce unless they are in mercantile fact material discrepancies, and unless an appropriate money-allowance against the price can give no adequate compensation for failure of exact performance.⁶⁶

Mercantile performance is also defined in the text.

A performance is mercantile when there is no substantial defect, that is, when—

(i) the delivered lot is of such character as not in a material manner to increase the risks or burdens which would rest on the buyer under exact performance; and

(ii) it is of such character as reasonably to meet the operating or marketing requirements of the buyer in the course of his business, in general, and where the contract looks to a particular purpose, then also in regard to that particular purpose.⁶⁷

To the objection that this would lead to greater uncertainty, Llewellyn replies that "[t]he proposed policy presupposes the availability of *a skilled and specialized mercantile tribunal to pass on the question of fact . . .*"⁶⁸

Having recognized the need for special rules governing transactions between merchants, however, the 1941 text further authorizes courts to extend the special rules to transactions not between merchants "if the reason and convenience of the provision justify so doing."⁶⁹ The draftsman is cautious.

61. *Id.* §§ 1-D, -E(2). Section 1-D states:

Between merchants, the usage of trade, or of a particular trade, and any course of dealing between the parties, are presumed to be the background which the parties have presupposed in their bargaining and have intended to read into the particular contract; and express words are to be construed, where that is reasonable, as consistent with, rather than as a displacement of, such usage and course of dealing.

Compare U.C.C. §§ 1-205, 2-202, -208. Section 1-E of the 1941 draft governs conflict of usage. *Compare* U.C.C. § 1-205(2), (5), (6).

62. 1941 DRAFT, *supra* note 42, §§ 1 ("mercantile sufficiency"), 11-A. *Compare* U.C.C. §§ 2-508, -601.

63. Uniform Sales Act § 49. For discussion of this point, see 1941 DRAFT, *supra* note 42, at 101-03. *See generally* Honnold, *Buyer's Right of Rejection*, 97 U. PA. L. REV. 457 (1949).

64. 1941 DRAFT, *supra* note 42, § 11-A(2)(a). The buyer continues to have a right to recover damages for defective performance. *Id.*

65. Llewellyn stressed the desirability of incorporating a statement of purpose into the text itself as well as in the accompanying comments. *See, e.g., id.* at 19.

66. *Id.* § 11-A(2)(c).

67. *Id.* § 11-A(2)(b).

68. *Id.* at 101 (emphasis in original). *See also id.* at 103-04.

69. *Id.* § 1-B.

Transactions between merchants are known; sound and feasible rules can be set out in the draft text. Non-mercantile situations have not been sufficiently explored to ensure that the policy of a mercantile rule is properly applicable to the new situation. The draft text calls on courts to find implicit coverage where the "reason" of the text is relevant.⁷⁰

Provisions in the 1941 draft are drastically curtailed in the next generally-circulated draft, the Uniform Revised Sales Act of 1944.⁷¹ The definitions of "merchant" and "between merchants" are recast and emphasis is placed on the definition of "merchant."⁷² Courts retain the power to extend rules applicable "between merchants" to other transactions "when the circumstances and underlying reasons justify extending its application."⁷³ The expert merchant tribunal and the leeway provided by the concept of mercantile performance, however, are deleted without explanation.⁷⁴ These provisions were replaced by a general duty to carry out obligations under the Act in good faith. The definition of "good faith" includes not only honesty in fact but also, in the case of merchants, reasonable observance of commercial standards.⁷⁵

The 1944 draft does, however, include an elaborate Comment on the definition of "merchant" which continues to stress the special needs of professionals.⁷⁶ It suggests that courts had recognized these needs and that the revision simply spells out the implications of the earlier law. "[W]here experience has shown a certain type of rule to be clearly useful and applicable at least between merchants, [the Act states] the rule as generally applicable to that extent, and leave[s] to the Courts and where necessary the jury the issue of its possible extension"⁷⁷

Subsequent drafts of the sales provisions follow the basic pattern of the 1944 draft with respect to the merchant provisions. As these early drafts circulated more and more widely, growing concern was expressed regarding the special provisions for merchants. In a leading article attacking the Code, Professor Williston, draftsman of the 1906 Act and author of the leading commentary on that Act, complained of the "novel" definition of "merchant."⁷⁸ All persons engaged in buying or selling goods, he argued, should be subject to the same rights and duties.⁷⁹ He also suggested that the definition of "merchant" was ambiguous and that authority to extend a

70. *Id.* at 51.

71. ALI JOINT EDITORIAL COMMITTEE, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, *UNIFORM REVISED SALES ACT (Proposed Final Draft No. 1, 1944)* (Sales Chapter of Proposed Commercial Code) [hereinafter cited as 1944 DRAFT].

72. *Id.* § 7(1), (3).

73. *Id.* § 1(3). See generally comment on § 1. *Id.* at 72-78. Note in particular the suggestion that the "reason" of the special "good faith" standards for merchants (§ 10(1); see note 74 *infra*) might be extended to a non-merchant "insofar as the person is chargeable with the standards laid down for merchants." *Id.* at 77.

74. Exact performance is required, subject to the obligation of good faith. *Id.* §§ 10(1), 26(2). See also comment on § 10. *Id.* at 97.

75. *Id.* § 10(1).

76. Comment on § 7. *Id.* at 89-93. Authorship may be attributed to Llewellyn.

77. *Id.* at 91-92.

78. Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 561, 572-73 (1950).

79. *Id.* at 573.

mercantile rule to non-merchants would lead to uncertainty.⁸⁰ Williston's colleagues at the Harvard Law School, however, did not find these objections conclusive.⁸¹ A committee of an American Bar Association section reserved judgment on the wisdom of these special rules, recognizing strong arguments on both sides.⁸² At the urging of ABA representatives, however, the Editorial Board of the Code did vote to delete the subsection authorizing courts to extend rules applicable between merchants to non-professionals.⁸³ The higher "good faith" obligations imposed on merchants was also subject to considerable criticism.⁸⁴

On publication of the Final Text edition in November 1951 the Uniform Commercial Code included special definitions of "merchant" and "between merchants," a number of special rules for transactions between merchants,⁸⁵ and a general obligation on merchants in sales transactions to act not only honestly but also in accordance with "reasonable commercial standards of fair dealing in the trade."⁸⁶ Criticism of these Code provisions continued. On several occasions Llewellyn defended these provisions before the New York Law Revision Commission, which subjected the Code to close scrutiny over a three-year period.⁸⁷ In an elaborate response to a memorandum submitted by a committee of the Commerce and Industry Association of New York Llewellyn stressed that the existence of special professional rules was ancient and that the Uniform Sales Act itself recognized this.⁸⁸ He noted that the pervasive use of "usage of trade" in the Code necessarily required distinguishing professionals from non-professionals. He also argued that justice required the classification: "[s]ound and wise building of rules of law calls for sound and wise classification of the problem-situations."⁸⁹ Finally, he suggested that courts would be justified in taking an issue away from the jury if the statute referred to "merchants."⁹⁰

80. *Id.*

81. *Report on Article 2—Sales by Certain Members of the Faculty of Harvard Law School*, 6 BUS. LAW. 151, 154 (1951). The authors do not mention Professor Williston as the source of these criticisms. For an indication of how seriously those involved with the Code took Professor Williston's criticism on this point, see Letter from Walter D. Malcolm to Judge Herbert F. Goodrich (Nov. 21, 1950), reprinted in 6 BUS. LAW. 164-66 (1951).

82. *Report of Committee on the Proposed Commercial Code*, 6 BUS. LAW. 119, 126 (1951).

83. *Hearing Before Enlarged Editorial Board*, Jan. 27-29, 1951, 6 BUS. LAW. 164, 181-82 (1951). See also Professor Kripke's comment on the ambiguity of the definition of "merchant." *Id.* at 182-83.

84. *Report*, *supra* note 82, at 126-28. See also note 154 *infra* and accompanying text. For the legislative history of the "good faith" provisions see Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 812-14 (1958); Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 207-13 (1968).

85. For a list and classification of these merchant provisions see U.C.C. § 2-104, Comment 2. See also Dolan, *supra* note 45; Newell, *supra* note 45.

86. U.C.C. § 2-103(1)(b).

87. For comment on the Commission's study of the Code in the context of an evaluation of the Commission's work see MacDonald, *Legal Research Translated into Legislative Action: The New York Law Revision Commission 1934-1963*, 48 CORNELL L.Q. 401, 435-38, 450-52 (1963). For a reflection by Llewellyn on the Commission's study of the Code see K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 183 n.186 (1960).

88. 1 REPORT OF THE NEW YORK LAW REVISION COMMISSION FOR 1954, at 107-08. See also *id.* at 165-66.

89. *Id.* at 108.

90. *Id.* The full comment states:

But more important for the men of commerce is another phase of classification: If the statute says 'reasonable,' you go to the jury with no guidance at all. If the statute says 'commercially reasonable,' the jury is politely requested to

Whether or not through Llewellyn's efforts, the New York Commission suggested only minor amendments and did not question the basic principle of separate rules for merchants.⁹¹ The 1958 Official Text differs on this point only slightly from the first Final Text of 1951.⁹²

Sketchy as this review of the Code "merchant" provisions is, it nevertheless suggests the complexity which lies behind the assumption that the final text of article II is a true measure of Llewellyn's jurisprudence. One does not know why many changes were made. Indeed, one does not know whether Llewellyn himself made the decision to amend or omit. His lifelong interest in commercial dispute-resolution,⁹³ for example, suggests that he regretted the deletion of the expert merchant tribunal provided in the 1941 draft text.⁹⁴ He may have decided, however, that this innovation would be unacceptable to state legislatures; he may have concluded that the institution was of low priority because of the resurgence of the "Grand Style" of reasoning by the state courts dealing with major commercial disputes.⁹⁵

The review of these "merchant" provisions does lay the groundwork, however, for noting several major themes in Llewellyn's thought which Professor Danzig does not examine closely enough. These themes are Llewellyn's concern for "lump-concept thinking" and his emphasis on the "private law" nature of the Code.

Llewellyn consistently attacked the use of lump concepts to solve distinct practical problems. His strictures on the concept of title are the most famous of these attacks. As early as his 1930 Sales casebook, Llewellyn contrasted lump-concept thinking with narrow-issue thinking when discussing title.

try to play the part of a man-in-the-trade—which helps some. But if the statute says 'dealer' or 'merchant,' the court can in case after case take the issue from the jury. This means precedent and certainty, steadily building. If the classification makes sense, the results are satisfactory in justice, they speed judicial administration, they increase certainty for counselors in advance as well as for advocates. If the classification makes sense.

Id. (emphasis in original). The comment should be contrasted with the earlier emphasis on the need for the expert merchant tribunal. See notes 50-60 *supra* and the accompanying text.

91. REPORT OF THE NEW YORK LAW REVISION COMMISSION FOR 1956, at 366.

92. Comment 2 was introduced in the place of two earlier comments on U.C.C. § 2-104.

93. See, e.g., K. LLEWELLYN, *supra* note 87, at 333-34. See also *id.* at 327; Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 874 (1939). The institution of an expert merchant tribunal as found in the 1941 draft, see note 50 *supra* and accompanying text, is also suggested in Phillips, *A Practical Method for the Determination of Business Fact*, 82 U. PA. L. REV. 230, 250-51 (1934). For a comment by Llewellyn on this article see Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 392 n.132 (1937).

Llewellyn's concern for the practical problem of *proof* is worth stressing. He recognized the difficulty of presenting evidence of trade usage. Without an institution such as Llewellyn proposes in the 1941 draft, for example, summary judgment will be denied if there is a colorable claim that usage of trade supplements or even qualifies an agreement. See *Moline Mfg. Co. v. North East Independent School Dist.*, 503 S.W.2d 833, 837-41 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.). For a general discussion of the practical implications of the Code's jurisprudence see Murray, *The Realism of Behaviorism Under the Uniform Commercial Code*, 51 ORE. L. REV. 269, 300-01 (1972).

94. See notes 50-60 *supra* and the accompanying text.

95. A major theme of Llewellyn's later work is his belief that contemporary courts were returning to a "Grand Style" of reasoning. See 1941 DRAFT, *supra* note 42, at 25; K. LLEWELLYN, *supra* note 87, *passim*. Llewellyn contrasted the "Grand Style" with the "Formal Style." The first he defined as "'Precedent' guided, but 'principle' controlled; and nothing was good 'Principle' which did not look like wisdom-in-result for the welfare of All-of-us." The latter he defined: "'Precedent' was to control, not merely to guide; 'Principle' was to be tested by whether it made for order in the law, not by whether it made wisdom-in-result." Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 396 (1950).

Lump-concept thinking moves in terms of wide premises. Decide that on specific facts 'title' is in either B or S; and you can then proceed to draw a dozen conclusions, as to risk, price, rules of damages, levy by creditors, etc.; among the dozen will be one deciding the case in hand. . . . The narrow issues that arise on questions of 'title' are largely questions involving the allocation of a great number of distinct risks: risk of destruction; risk of disposing of the goods (can S have price, or only damages?); risk of being able to cover in the event of non-delivery (time and place of measure of damages); risk of S's insolvency (B opposing S's creditors); risk of S's or B's dishonesty or bad faith (attempted fraudulent resale to a third party). Each of these risk problems raises policy questions all its own; different facts have different significance in regard to the different questions—as a matter of sense. Narrow-issue thinking leads to weighing these differences as a matter of sense, in order to see whether similar differences should follow, in law.⁹⁶

This theme is also developed in a series of articles published in the late 1930's which trace the development of Anglo-American sales law "Through Title to Contract and a Bit Beyond":⁹⁷ "In a word, the Title-concept lumps so many policy decisions together that the same decision about Title, in two cases having similar facts, would repeatedly lead to unfortunate results in one or the other, according to the issue."⁹⁸ Llewellyn did not suggest the elimination of the Title-concept but he would relegate it to use as merely a "general residuary clause."⁹⁹

Article II adopts Llewellyn's iconoclastic approach to "title," much to the consternation of Professor Williston.¹⁰⁰ The Comment to the very first section of article II states:

The arrangement of the present Article is in terms of contract for sale and the various steps of its performance. The legal consequences are stated as following directly from the contract and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determining factor. The purpose is to avoid making practical men turn upon the location of an intangible something, the passing of which no man can prove by evidence and to substitute for such abstractions proof of words and actions of a tangible character.¹⁰¹

96. K. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 565 (1930). See generally *id.* at 561-73. Although the numerous reviews of this casebook note the innovative approach taken by Llewellyn to the materials, none links the organization of his casebook to the intensive Columbia Law School review of the curriculum, 1926-1928. But see W. TWINING, *supra* note 20, at 57, 128-40 (especially pp. 135-37). A contrast between Llewellyn's approach and that of the Columbia Law School study deserves further elaboration. See H. OLIPHANT, *SUMMARY OF STUDIES IN LEGAL EDUCATION BY THE FACULTY OF LAW OF COLUMBIA UNIVERSITY* 128-35 (1928).

97. Llewellyn, *On Warranty of Quality, and Society* (pts. 1 & 2), 36 COLUM. L. REV. 699 (1936), 37 COLUM. L. REV. 341 (1937); Llewellyn, *Through Title to Contract and A Bit Beyond*, 15 N.Y.U.L.Q. REV. 159 (1938); Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939); Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939). These articles have been described by one commentator as perhaps "Llewellyn's most durable work." Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y REV. 9, 28 n.61 (1975). Rather surprisingly, Professor Danzig pays no attention to these articles.

98. Llewellyn, *Through Title to Contract and a Bit Beyond*, 15 N.Y.U.L.Q. REV. 159, 171 (1938).

99. *Id.* at 170.

100. Williston, *supra* note 78, at 566-72.

101. U.C.C. § 2-101, Comment.

Section 2-401 sets out the residual general rule on location of title, a rule to be applied only when a specific Code provision did not provide a particularized solution.¹⁰²

What is less frequently recognized is that Llewellyn also pointed out that "seller" and "buyer" are lump concepts and that the article II "merchant" provisions reflect Llewellyn's attempt to replace "lump-concept thinking" with "narrow-issue thinking."¹⁰³ In the same article which contained the devastating attack on "title," Llewellyn states that

the traditional lump-concept 'Seller,' in terms of which the Uniform Sales Act is cast, has lost working value not only in the measure in which sellers, and selling units, and business units which have sales units as adjuncts, have come to vary in complexity and power; but has lost value also as growing economic differentiation has channeled the activities and interests of significantly different types of seller (or buyer) into different lines. . . . In consequence, and in test of the thesis that the concepts basic to the 'general law of Sales' are in many aspects not only too general but in their lines of generality poorly adjusted to the facts, I concentrate upon a single portion of the material, itself manifold enough: the mercantile.¹⁰⁴

This same theme is also developed in Llewellyn's other articles written at this time.¹⁰⁵ For example, when discussing the buyer's right to reject non-conforming goods even for trivial defects Llewellyn remarks that reasonable adjustment by merchants is proper and to allow rejection for nontroubling defects is bad policy.¹⁰⁶ "The difficulty," Llewellyn adds,

lies of course in trying to regulate by a single set of rules such situations as farm machinery, a contractor-buyer of stuff to be used in a job already under way, a girl who finds that the collar of the dress does not set off her hair as she had thought it would, a grocer whose customers feel that cardboard boxes are not of proper grade if they are dented—and a merchant-to-merchant shipment of timber or wool or apples or grain which is pretty close to the agreement.¹⁰⁷

The Code "merchant" provisions break down the general (lump) rules of the Uniform Sales Act of 1906 and apply many rules to narrower classes of transactions.¹⁰⁸

102. *Id.* § 2-401. "Title" has not been eliminated entirely. *See, e.g., id.* §§ 2-106(1), -327(1)(a). For the references to "title" in the consignment provisions see Winship, *The "True" Consignment Under the Uniform Commercial Code, and Related Peccadilloes*, 29 Sw. L.J. 825, 849-50 (1975).

103. See reference to this point in R. SPEIDEL, R. SUMMERS & J. WHITE, *supra* note 37, at 657.

104. Llewellyn, *supra* note 98, at 163-64. *See also id.* at 160 n.2.

105. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 874-75, 903-04 (1939); Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 388-89, 396-97 (1937).

106. Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 389 (1937).

107. *Id.* at 389 n.126. *See* 1941 DRAFT, *supra* note 42, § 11-A. *See also* notes 64-68 *supra* and accompanying text. *Compare* U.C.C. § 2-601.

108. Llewellyn insisted, however, that despite the Uniform Sales Act the better judges have distinguished the mercantile fact-situation. *See, e.g.,* Llewellyn's memorandum to the New York Law Revision Commission. 1 REPORT OF THE NEW YORK LAW REVISION COMMISSION FOR 1954, at 107-08. In this memorandum he makes the following general point about classification and rules: "The building of rules of law is by its very nature based on classification. Sound and wise building of rules of law calls for sound and wise classification of the problem-situations. Such classification makes for justice-in-result" *Id.* at 108.

Breaking down general rules into more specific rules prescribed for limited fact situations is typical of article II. Although this approach is pervasive throughout that article, an excellent example is the allocation of risk of loss in sections 2-509 and 2-510 of the Code. These sections first define the situation in which the rule is to operate, then announce the rule which allocates the risk in that situation.¹⁰⁹ After several specific situations and rules are set out, two residual rules are announced: one for merchants and one for non-merchants.¹¹⁰ The Comment then spells out the policy underlying the allocation of risk: actual control of goods and likelihood of the party's having insurance.¹¹¹ These sections of the Code are classic examples of Llewellyn's goal in drafting "the amendment-resistant Uniform Act for a whole broad field": "an unmistakable indication, first, of the direction of the provision; second, of the reason for picking that direction for that situation; third, of the reason for seeing the situation covered as being a significant unit of coverage."¹¹²

In other words, article II adopts narrow-issue thinking in many of its sections. These sections focus attention on the situation and reason for the rules. A court may extend or limit a Code rule if the situation or reason so suggests. But in so acting the Court is guided by a prior legislative statement of policy. These narrow-issue sections are far more common than Professor Danzig implies when he focuses on the "troublesome vacuity" of the unconscionability provision of section 2-302.¹¹³ The narrow-issue provisions do not necessarily contradict Danzig's theme that the courts carry the weight of lawmaking in Llewellyn's jurisprudence because the Code encourages the courts to read the legislation liberally.¹¹⁴ They do suggest, however, that Danzig's evidence is incomplete and his conclusion too broad.

109. See, e.g., U.C.C. § 2-509(1)(a);

Situation: if there is an absence of breach (caption; see U.C.C. § 1-109); *and* where the contract requires or authorizes the seller to ship the goods by carrier (U.C.C. § 2-509(1) preamble); *and* if it does not require him to deliver them at a particular destination (U.C.C. § 2-509(1)(a) first clause); *and* whether or not the shipment is under reservation (U.C.C. § 2-509(1)(a) last clause).

Rule: the risk of loss passes to the buyer when the goods are duly delivered to the carrier (U.C.C. § 2-509(1)(a)).

Similar limitation of situation followed by rule can be found in U.C.C. §§ 2-509(1)(b), (2). U.C.C. § 2-510 can be broken down in a similar manner beginning with the limitation that there has been a breach of contract.

110. U.C.C. § 2-509(3).

111. U.C.C. § 2-509, Comment 3. The comments also stress that the section adopts "the contractual approach rather than an arbitrary shifting of the risk with the 'property' in the goods." U.C.C. § 2-509, Comment 1.

112. 1941 DRAFT, *supra* note 42, at 26; see note 30 *supra*.

113. Danzig, *supra* note 4, at 627. To be fair to Danzig he does refer in passing to certain "per se" rules, including § 2-509. *Id.* at 633 n.44 and the accompanying text.

I think it typical of Danzig's approach that he should choose § 2-302 and cite Leff's article (*supra* note 18) as the "leading commentary." Danzig, *supra* note 4, at 627 n.22. Section 2-302 has stirred up considerable academic controversy. In an important recent study of the German version of the unconscionability concept Professor John P. Dawson calls Leff's article the "silliest" of the numerous articles on the subject. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1041 n.1 (1976). Dawson suggests that an article by Ellinghaus is the best of these articles. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969). Ellinghaus is suggestive, if not altogether clear, on the role the Code's general provisions, including § 2-302, should play. See *id.* at 759-61, 796-803.

The assumption that § 2-302 is typical of the Uniform Commercial Code sometimes leads even astute commentators astray. See, e.g., Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1704-05 (1976).

114. U.C.C. §§ 1-102(1), (2), Comment 1.

In addition, Professor Danzig does not do justice to Llewellyn's own perception that sales law, the law governing primarily transactions between merchants, is private law. Danzig himself notes that merchants are a subcommunity with its own mechanisms for resolving disputes and with its own sense of fairness.¹¹⁵ He suggests that this "situational factor" is strongly reinforced by Llewellyn's jurisprudential preferences, but he nowhere suggests that Llewellyn shared this perception that merchants form a special subcommunity. More than Llewellyn's general jurisprudence is involved; Llewellyn consciously adapted his approach to the Code to his belief that commercial rules are private law rules.¹¹⁶

Anglo-American legal theory does not divide law into public and private law.¹¹⁷ Llewellyn, however, did make this distinction and clearly included sales law in the area of private law, although he recognized that the distinction is not clear-cut. In a report he drafted for a Committee on Curriculum of the Association of American Law Schools he notes that there is no suggestion "that there can be any law which is not in material part 'public' ";¹¹⁸ but he goes on to characterize subjects in "private law" as "relatively fixed and slow moving, relatively simple in subject-matter and background, relatively established in their basic policies, relatively confined to judicial action on both the regulative and enforcement sides."¹¹⁹

One characteristic of private law, and especially of sales law when regarded as rules governing professional businessmen, is that there is little clash of interests. "[M]ost of the Sales field is uncolored as most other law is not by the clash of class and passion."¹²⁰ In a report accompanying an early draft, the Sales statute is referred to as "both non-political, and non-criminal, in character."¹²¹ Defending the Code before the New York Law Revision Commission, Llewellyn again stressed the "non-political" character of commercial law.¹²² By his suggestion that article II rules be limited, in many cases, to transactions between merchants, Llewellyn limits the rules to situations where experience shows that all interests are satisfied by the rule.

115. Danzig, *supra* note 4, at 622-23. In a revealing casual phrase Danzig characterizes commercial law as "at the margin of public law." *Id.* at 622. It is difficult to believe that Danzig would recognize the possibility of any private law. He apparently would always require legislation to state the "ideal" rule: *i.e.*, to make law means to make a moral choice. It is difficult, however, to perceive what moral choices Danzig would actually recommend in transactions between merchants.

116. Danzig suggests that Llewellyn's "unusual" view of the legal process was in many respects a result of "his lifelong immersion in contract law." Danzig, *supra* note 4, at 622 n.5. I would qualify this only by stressing that Llewellyn was particularly interested in commercial contracts and commercial dispute resolution. See notes 93, 97 *supra*. See also W. TWINING, *supra* note 20, at 338-40.

117. See, however, Professor Wolfgang Friedmann's remark that the division between public and private law is of growing significance in English and American law. W. FRIEDMANN, *LEGAL THEORY* 232 (5th ed. 1967).

118. Committee on Curriculum of the Association of American Law Schools, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345, 378 n.16 (1945).

119. *Id.* at 378 (emphasis in original).

120. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 726 (1939). See, however, the interesting comment on the failure of interest groups to mobilize before the NCCUSL in the preparation of the Uniform Sales Act. Llewellyn, *supra* note 106, at 382-83.

121. 1941 DRAFT, *supra* note 42, at 25. See also Llewellyn's September 1940 memorandum reprinted in W. TWINING, *supra* note 20, at 524.

122. See *Statement to the Law Revision Commission by Professor Karl N. Llewellyn*, 1 REPORT OF THE NEW YORK LAW REVISION COMMISSION FOR 1955, *passim*.

A second characteristic of the private law of contracts is that private parties are permitted to arrive at "dickered" deals which a court will enforce in the absence of an overriding public interest. This "freedom of contract" premise is so basic it is assumed in the Code background materials. The 1941 Report on the Revised Uniform Sales Act states briefly its assumption-in-policy: "The Draft proceeds upon the assumption-in-policy that buyers and sellers ought (within the limits of such rules as those on legality) to be free to bargain as they choose."¹²³ The policy lies behind section 1-102(3), which in effect permits parties to agree on any matter without reference to Code rules except where Code rules are mandatory.¹²⁴

Llewellyn did acknowledge the growth of public law regulation of commercial matters. He recognizes that regulatory statutes and governmental standards, as well as changes in commercial practices, have resulted in the waning in relative importance of traditional sales law.¹²⁵ In 1941 he expressed amazement at the interest in the proposed revision of the Uniform Sales Act. "The presence of so much active interest in basic 'private' law at a time when men's minds are of necessity so largely occupied with the 'public' phases of law, is indeed little less than astounding."¹²⁶ The study of "public" commercial law is important¹²⁷ but, as for so many topics in which Llewellyn took an interest, Llewellyn never found time to explore the subject in depth. One of the ironies of the successful promulgation of the Code is that the number of transactions it governs will become increasingly limited by regulatory statutes.¹²⁸ For a scholar with Llewellyn's historical insight, this is an irony he would appreciate.

C. Courts and Legislatures

Danzig's article focuses on the respective roles of courts and legislatures. He criticizes Llewellyn for minimizing "the differences between the ways courts and legislatures operate."¹²⁹ At one level this criticism assumes that these institutions have unique functions or capacities and that Llewellyn sins by having one institution carry out functions of the other. There are references to delegation of legislative decisions¹³⁰ as "derogation of the

123. 1941 DRAFT, *supra* note 42, at 24.

124. The history of U.C.C. § 1-102(4) should be studied further. Initially, each section in article II was examined to see if it should be subject to contrary agreement of the parties. If it was, the phrase "unless otherwise agreed" was added; if the rule was mandatory, the phrase was omitted. Only later was § 1-102(4) inserted. See S. MENTSCHIKOFF, COMMERCIAL TRANSACTIONS: CASES AND MATERIALS 10 (1970). Llewellyn recognized the distinction between "Iron Rules" and "Rules of Help or Supplement." Llewellyn, *supra* note 106, at 385. For an excellent discussion of the different forms commercial rules may take see R. SPEIDEL, R. SUMMERS & J. WHITE, *supra* note 37, at 2-5.

125. Llewellyn, *supra* note 120, at 726.

126. 1941 DRAFT, *supra* note 42, at 7.

127. See Llewellyn, *supra* note 3, at 808-10. In this article Llewellyn outlines a projected Coursebook on American Institutions which he never completed. For the modern period Llewellyn proposes to spend almost twice as much time on regulatory law as opposed to traditional private case law. See also Committee on Curriculum, *supra* note 118, at 378-85.

128. For a similar assessment see L. FRIEDMAN, A HISTORY OF AMERICAN LAW 581-82 (1973). Professor Friedmann has also put this observation in a theoretical framework. Friedmann, *Law Reform in Historical Perspective*, 13 ST. LOUIS U.L.J. 351, 356-57 (1969).

129. Danzig, *supra* note 4, at 635.

130. *Id.*

legislative function,"¹³¹ and a "renunciation of legislative responsibility and power."¹³² Similarly, the form of the Code is also criticized for not being "statutory" enough: it "reads very much like a judicial opinion";¹³³ it is frequently phrased in "a most common law manner."¹³⁴ To this is added the suggestion that these views are suspect because "unusual" and not "traditional."¹³⁵

This level of Danzig's criticism is difficult to take seriously either as a matter of practice or of theory. Historically, courts and legislatures in many political systems have common origins and at different stages in their evolution they have performed different functions. Political systems as closely related to the United States as that of England and France allocate law-making authority in a different way. Theoretically, the simple court-legislature dichotomy omits the extremely important role of the executive or administrative agency as law-maker or dispute-resolver.

At a second level Danzig's argument deserves more attention. There are two attributes of legislatures, not shared by courts, which legitimate the allocation to legislature of the task of law-making. They can adopt general rules which maximize social utility and they can adopt rules which actively shape society because they are "democratically elected and politically responsive."¹³⁶ There is also a suggestion that legislatures have resources or "tools"¹³⁷ not available to courts. As general propositions there is little difficulty in accepting these arguments, but the distinctions Danzig draws are questions of degree rather than kind,¹³⁸ and there are questions he leaves unanswered.¹³⁹ Whether or not Danzig's arguments are acceptable, the important point for understanding Llewellyn's thought is that Llewellyn did not address these arguments.

Surprisingly, Professor Danzig does not draw on Llewellyn's discussions of statutory interpretation in which Llewellyn comes closest to addressing Danzig's arguments. The basic theme of these writings is that judges should

131. *Id.*

132. *Id.* at 622. Danzig also criticizes Llewellyn for "denigrating" [*sic*] "the traditional role of the legislature." *Id.* at 631.

133. *Id.* at 635.

134. *Id.* at 632-33.

135. *See, e.g., id.* at 622, 623, 631, 632.

136. *Id.* at 625. *See also* Danzig's comment on judges: they are "of low visibility and low responsibility from the standpoint of the larger public." *Id.* at 630.

137. *Id.* at 625. Danzig uses "tools" in a special sense. Ethics and economics guide legislatures in lawmaking, whereas Llewellyn draws on the "methods and messages of sociology and anthropology." *Id.*

138. Implicit in Danzig's discussion, for example, is a contrast of the legislature's theoretical ability to take into account the interests of all groups when formulating general rules with the court's resolution of only a particular dispute between specific interested parties. In practice this is a difference of degree only. There are liberal procedural rules for intervention and for submission of amicus briefs. Moreover, many judges consider potential general impact of their particular rulings. Legislators, on the other hand, face lobby groups with widely varying resources and the lawmakers are often required to make political trade-offs. As a result, no particular piece of legislation necessarily maximizes social welfare.

139. Underlying Danzig's discussion is the suggestion that legislatures should be active: legislative passivity is condemned. *See, e.g.,* Danzig, *supra* note 4, at 627. But if "dickered" agreements maximize the parties' well-being, is it necessary to have any legal rules beyond "passive" enabling ones? Indeed, should any area of the law be left to common law development? Danzig's brief discussion of the first question leaves one hanging. Danzig, *supra* note 4, at 630. Nor is it clear what Danzig believes the role of judges should be.

decide cases in the "Grand Style" in which no distinction is made between the handling of prior cases and statutes. As Llewellyn wrote in *The Common Law Tradition*:

This book is not, as a book, about how our State supreme courts do deal or ought to deal with statutes. Yet again and again, in order to avoid misinterpretation, I have had to insist that the range of techniques correctly available in dealing with statutes is roughly equivalent to the range correctly available in dealing with case law materials.¹⁴⁰

Judges whom Llewellyn respected, such as Frankfurter and Cardozo, he criticized for "formal self-prostration before the legislative power."¹⁴¹

Frankfurter writes, talks, thinks, and feels in the case law bailiwick or in that of such broader Constitutional provisions as 'due process' in the Holmes tradition of conscious and responsible, although ordered and restrained, creation; but on a point of statutory construction he can write in a fog or phantasmagoria of fictional legislative intent and of a judicial powerlessness and consequent non- or irresponsibility that forfeits all intellectual contact with the Grand Tradition of case law.¹⁴²

In effect, case law and statutory materials have equal authority because they are both ultimately subject to court interpretation using similar techniques.

Llewellyn elaborated on how a court should approach statutory construction in a published article¹⁴³ directed toward that very problem.

If a statute is to be merged into a going system of law . . . the court must do the merging, and must in so doing take account of the policy of the statute—or else substitute its own version of such policy. Creative reshaping of the net result is thus inevitable.¹⁴⁴

He points out, however, that there are two kinds of policy: the immediate problem the legislator addressed in the statute and the underlying policy to be applied to unforeseen situations. In the latter case,

the quest is not properly for the sense originally intended by the statute, for the sense sought originally to be *put into it*, but rather for the sense which *can be quarried out of it* in the light of the new situation. Broad purposes can indeed reach far beyond details known or knowable at the time of drafting.¹⁴⁵

The function of the courts, according to Llewellyn, is to accept the legislature's choice of policy and to construe the legislation freely in order to implement the policy.

Some Code provisions and Comments reflect these views,¹⁴⁶ although as indicated earlier Danzig exaggerates the extent of these open-ended provisions. Ironically, if the Code incorporates Llewellyn's perspective on the role of the courts, the ultimate responsibility for this lies with the state legislatures which adopted the Code. Few, if any, of these legislatures acted

140. K. LLEWELLYN, *supra* note 87, at 371. See also *id.* at 125-26, 371-82.

141. *Id.* at 380.

142. *Id.* Compare Llewellyn's remarks on Scrutton in Llewellyn, *supra* note 98, at 186 n.48.

143. Llewellyn, *supra* note 95.

144. *Id.* at 400. Passages from this article are reprinted in K. LLEWELLYN, *supra* note 87, at 373-75.

145. Llewellyn, *supra* note 95, at 400 (emphasis in original).

146. See, e.g., U.C.C. § 1-102, Comment 1. Llewellyn did not hesitate to insert policy statements in the comments if outvoted on the text. See Llewellyn, *supra* note 27, at 782, 794.

as the social-maximizing lawmakers of Danzig's ideal type.¹⁴⁷ Not that there was passive acceptance of the Code. Interest groups lobbied; amendments were made.¹⁴⁸ Indeed, so many non-uniform amendments were adopted that the sponsors created a Permanent Editorial Board to review variations and itself recommend amendments.¹⁴⁹ These state legislatures in theory could have refused to "delegate" authority to courts but for the most part they did not do so.¹⁵⁰

State legislatures, of course, did not undertake thorough revision of the Uniform Commercial Code because most of them do not have the time or resources to put together a complicated private law statute. Once this practical constraint is recognized, it becomes important to determine how different interests might be recognized in the drafting process prior to legislative consideration. If some interest groups are not consulted, the legitimacy of the legislation might be questioned. In this context Llewellyn's emphasis on democracy in the drafting process takes on greater significance.¹⁵¹ True, consumer interests may not have been represented,¹⁵² but at least Llewellyn sought to work out a practical solution to this problem of reconciling actual practice with democratic theory. Danzig's discussion fails to do justice to the complexity existing institutions pose.

D. *Morality and the Code*

To Professor Danzig's basic insight into the ethical posture of the Uniform Commercial Code I have nothing to add; I only wish I had said it as well.

Ethical questions are relevant, but they are regarded as posing problems of discovery rather than choice. The premise appears to be that values have an objectively ascertainable existence and a near universal acceptance and thus can be judicially discovered just as 'reasonable price' can be ascertained by reference to a market.¹⁵³

To Danzig's discussion I would only add an historical footnote. Not only did the draftsmen believe ethical considerations are relevant, but some businessmen and business lawyers also took the draftsmen seriously and reacted violently to provisions such as section 1-203 of the Code. While purporting to mediate between these "conflicting" points of view, the American Bar

147. The study by the New York Law Revision Commission comes as close as any to Danzig's ideal type. See note 87 *supra*. Other state legislatures made varying efforts to assess the Code. See, e.g., Ruud, *The Texas Legislative History of the Uniform Commercial Code*, 44 TEXAS L. REV. 597 (1966).

148. See, e.g., the state variations on U.C.C. § 2-318. The Code itself now permits states to choose between three alternatives. In some states the legislature left development in the area of warranty liability to the courts. See, e.g., TEX. BUS. & COMM. CODE ANN. § 2.318 (Tex. U.C.C. Vernon 1968); Ruud, *supra* note 147, at 601-02; Winship, *Commercial Transactions, Annual Survey of Texas Law*, 31 SW. L.J. 165, 173 n.46 (1977).

149. See R. BRAUCHER & R. RIEGERT, *supra* note 20, at 29-31.

150. U.C.C. § 2-302, for example, was enacted without amendment in all states except California and North Carolina, with North Carolina returning to the fold in 1971.

151. See note 29 *supra*. Llewellyn criticized lawyers who participated in American Bar Association public activities and "who blithely and skillfully ministered to client and special interest under the guise of working and thinking for the larger whole." K. LLEWELLYN, *supra* note 87, at 332.

152. See 1 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 9.2, at 293 (1965); Carroll, *supra* note 19, at 139-43.

153. Danzig, *supra* note 4, at 629.

Association committee reviewing the Code recommended amendments to the "good faith" provisions which were ultimately adopted.¹⁵⁴ The reported violent reaction is somewhat surprising if these provisions, as Danzig suggests, merely reaffirm predominant morals of the marketplace.

IV. CONCLUSION

Professor Richard Danzig has written a suggestive short study of the jurisprudential underpinnings of article II of the Uniform Commercial Code. In the course of reviewing his essay I have suggested that Danzig's assumption that article II is a true measure of Karl Llewellyn's jurisprudential perspective should be reassessed. Closer examination of early drafts of the Code, especially the special mercantile provisions, reveals Llewellyn's thought in a purer form and brings out greater complexity in this thought than Danzig suggests. In particular, Danzig's dichotomy between the proper roles for courts and legislatures oversimplifies both Llewellyn's approach to semi-permanent legislation and the characteristics of the provisions of article II.

In a key footnote Danzig suggests that his initial intuition was that "Article II of the UCC might profitably be analyzed as an attempt to coerce courts into deciding cases in the Grand Style by means of the devices described in the text."¹⁵⁵ After study he concluded, however, that Llewellyn just did not like statutes. My own review of both Llewellyn's work and Danzig's presentation leaves me with the belief that Danzig's initial intuition was correct.

Does it make any difference whether Danzig's intuition or mine is more accurate? Surely for the jurist it makes some slight difference. But Danzig argues that the student of commercial law should also be concerned because he or she should read the Code with reference to its philosophic, sociological, and economic premises. Perhaps. It is difficult, however, to think of how Danzig's perceptive comments about morals and the Code will solve the practical problems of the practitioner or of the judge. The Code is with us no matter how amoral or how far it has gone in delegating legislative functions to judges. The Code does not dictate any one particular approach to statutory interpretation. Suggestive though Danzig's essay is, in the last analysis it is less useful than a growing number of distinguished studies of Code methodology.¹⁵⁶

154. *Report of Committee on the Proposed Commercial Code*, 6 BUS. LAW. 119, 126-28 (1951). See also note 84 *supra*.

155. Danzig, *supra* note 4, at 632 n.39.

156. See Carroll, *supra* note 19; Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291; Hillman, *Construction of the Uniform Commercial Code UCC Section 1-103 and "Code" Methodology*, 18 B.C. INDUS. & COM. L. REV. 655 (1977); Mooney, *supra* note 21; Nickles, *Problems of Sources of Law Relationships Under the Uniform Commercial Code—Part I: The Methodological Problem and The Civil Law Approach*, 31 ARK. L. REV. 1 (1977); Nickles, *Problems of Sources of Law Relationships Under the Uniform Code—Part II: The English Approach and A Solution to the Methodological Problem*, 31 ARK. L. REV. 171 (1977); Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880 (1965).